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10 **UNITED STATES DISTRICT COURT**
11 **SOUTHERN DISTRICT OF CALIFORNIA**

12 JEANNE BURNS, individually and on
13 behalf of all other similarly situated,

14 Plaintiff,

15 v.

16 TRISTAR PRODUCTS, INC.,
17

18 Defendant.
19

Case No. 14-cv-749-BAS(DHB)

**ORDER GRANTING
DEFENDANT'S MOTION TO
DISMISS**

[ECF No. 5]

20 On February 11, 2014, Plaintiff Jeanne Burns commenced this putative action
21 against Defendant Tristar Products, Inc. ("Tristar") in the San Diego Superior Court for
22 allegedly falsely advertising the Flex-Able Hose. Thereafter, Defendant removed this
23 action to federal court. Defendant now moves to dismiss Plaintiff's claims for
24 injunctive relief under Federal Rule of Civil Procedure 12(b)(1). Plaintiff opposes.

25 The Court finds this motion suitable for determination on the papers submitted
26 and without oral argument. *See* Civ. L.R. 7.1(d.1). For the following reasons, the
27 Court **GRANTS** Defendant's motion to dismiss.

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1 **I. BACKGROUND**

2 According to the complaint, “Defendant marketed and distributed the Flex-Able
3 Hoses both online and through retail outlets in California.” (Compl. ¶ 16.) The Flex-
4 Able Hose was marketed as a “durable and strong garden hose.” (*Id.* ¶ 18.) The
5 packaging and the infomercial touted the product as having “a tough double
6 construction” and being “designed like a fire-hose for speed, storage and strength, to
7 last a really long time.” (*Id.*) Plaintiff alleges that she “viewed the infomercial prior
8 to her purchase and believed that the Flex-Able Hose would be strong and would last
9 a long time based upon Defendant’s representations.” (*Id.*) She eventually purchased
10 a Flex-Able Hose from Defendant’s “interactive website.” (*Id.* ¶ 7.)

11 However, according to Plaintiff, the product did not “last a long time” and was
12 not “built strong.” (Compl. ¶¶ 7, 19.) Instead, “it leaked and ruptured shortly after her
13 purchase.” (*Id.* ¶ 7.) Plaintiff alleges that Defendant was “fully aware of the inherent
14 defect in the Flex-Able Hose[,]” and that “Defendant actively concealed the existence
15 and nature of the inherent defect[.]” (*Id.* ¶ 21.) She further alleges that had she
16 “known that the Flex-Able Hose was a flimsy hose with a propensity to leak and
17 rupture, she would not have purchased the product.” (*Id.* ¶¶ 7, 33, 58.)

18 On February 11, 2014, Plaintiff commenced this putative class action in the San
19 Diego Superior Court, asserting six claims: (1) violation of the Consumers Legal
20 Remedies Act; (2) violation the Unfair Competition Law (“UCL”) under California
21 Business and Professions Code § 17200; (3) violation of the UCL under California
22 Business and Professions Code § 17500; (4) fraud by omission; (5) breach of implied
23 warranty of merchantability; and (6) breach of implied warranty of fitness. Thereafter,
24 Defendant removed this action to federal court. Defendant now moves to dismiss
25 Plaintiff’s claims for injunctive relief under Rule 12(b)(1) for lack of Article III
26 standing. Plaintiff opposes.

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II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(1), a party may move to dismiss based on the court's lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). "A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989) (citation omitted). "Article III of the Constitution confines the federal courts to adjudication of actual 'Cases' and 'Controversies.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 590 (1992). Consequently, a "lack of Article III standing requires dismissal for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1)." *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011) (emphasis omitted). "For the purposes of ruling on a motion to dismiss for want of standing," the court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *see also Tyler v. Cuomo*, 236 F.3d 1124, 1131 (9th Cir. 2000).

The "irreducible constitutional minimum" of Article III standing contains three elements: (1) "the plaintiff must have suffered an 'injury in fact'"; (2) "there must be a causal connection between the injury and the conduct complained of"; and (3) "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Lujan*, 504 U.S. at 560-61. The injury in fact must be an invasion of a legally protected interest that is concrete and particularized, and actual or imminent, not conjectural or hypothetical. *Id.* at 560 (citation omitted). Furthermore, to satisfy the causal-connection prong, the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. *Id.* (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). Furthermore, "[s]tanding must be shown with respect to each form of relief sought, whether it be injunctive relief, damages or civil penalties." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007).

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III. DISCUSSION

Defendant argues that Plaintiff lacks Article III standing to pursue injunctive relief because there is no threat of a repeated injury. (Def.’s Mot. 2:10–5:25.) Plaintiff responds by urging the Court to apply the reasoning in *Henderson v. Gruma Corp.*, No. CV 10-04173, 2011 WL 1362188 (C.D. Cal. Apr. 11, 2011), under which she argues that she has Article III standing to pursue injunctive relief. (Pl.’s Opp’n 2:13–7:15.) For the following reasons, the Court agrees with Defendant.

“In a class action, standing is satisfied if at least one named plaintiff meets the requirements.” *Bates*, 511 F.3d at 985. “Standing to bring a damages claim does not necessarily imply standing to seek injunctive relief.” *Lanovaz v. Twinings N. Am., Inc.*, No. C-12-02646-RMW, 2014 WL 46822, at *9 (N.D. Cal. Jan. 6, 2014). Furthermore, “[u]nless the named plaintiffs are themselves entitled to seek injunctive relief, they may not represent a class seeking that relief.” *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999).

“The standing formulation for a plaintiff seeking prospective injunctive relief is simply one implementation of *Lujan*’s requirements.” *Bates*, 511 F.3d at 985. The plaintiff must demonstrate that he has suffered or is threatened with a “concrete and particularized” legal harm, coupled with “a sufficient likelihood that he will again be wronged in a similar way.” *Id.* (citing *Lujan*, 504 U.S. at 560; *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983)). Regarding the latter inquiry, the plaintiff must establish a “real and immediate threat of repeated injury.” *O’Shea v. Littleton*, 414 U.S. 488, 496 (1974). “[P]ast wrongs do not in themselves amount to [a] real and immediate threat of injury necessary to make out a case or controversy.” *Lyons*, 461 U.S. at 103. However, “past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury.” *O’Shea*, 414 U.S. at 496. “In addition, the claimed threat of injury must be likely to be redressed by the prospective injunctive relief.” *Bates*, 511 F.3d at 985-86.

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1 In *Henderson*, the court found that the plaintiffs in a false-advertising case retain
2 standing to pursue injunctive relief so long as the products continue to be deceptively
3 marketed and sold by the defendant. *Henderson*, 2011 WL 1362188, at *8. In reaching
4 that conclusion, the court reasoned that to hold otherwise would severely undermine
5 the objective of California's consumer protection laws "to protect both consumers *and*
6 *competitors* by promoting fair competition in commercial markets for goods and
7 services." *Id.* (citing *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 344 (2011))
8 (emphasis in original).

9 However, Supreme Court and Ninth Circuit precedent are clear that for a plaintiff
10 to have standing to pursue injunctive relief, there must be a "real and immediate threat
11 of repeated injury." *See Lujan*, 504 U.S. at 560; *O'Shea*, 414 U.S. at 496; *Bates*, 511
12 F.3d at 985. The Ninth Circuit recently reiterated that proposition in *Ervine v. Desert*
13 *View Reg'l Med. Ctr. Holdings, LLC*, 753 F.3d 862, 868 (9th Cir. 2014), stating that
14 "it is not the presence or 'absence of a past injury' that determines Article III standing
15 to seek injunctive relief; it is the imminent 'prospect of future injury.'" Consequently,
16 "[t]o the extent that *Henderson* and other cases purport to create a public-policy
17 exception to the standing requirement, that exception does not square with Article III's
18 mandate." *Delarose v. Boiron, Inc.*, No. SACV 10-1569, 2012 WL 8716658, at *5
19 (C.D. Cal. Dec. 28, 2012). Thus, this Court declines to follow *Henderson*, and Plaintiff
20 must demonstrate a real and immediate threat of repeated injury in order to have
21 standing to pursue injunctive relief. *See Bates*, 511 F.3d at 985; *see also Forcellati v.*
22 *Hyland's, Inc.*, No. CV 12-1983, 2014 WL 1410264, at *13 (C.D. Cal. Apr. 9, 2014)
23 (declining to follow *Henderson*); *Luman v. Theismann*, No. 2:13-cv-00656, 2014 WL
24 443960, at *8 (E.D. Cal. Feb. 4, 2014) (same); *Mason v. Nature's Innovation, Inc.*, No.
25 12cv3019, 2013 WL 1969957, at *3-4 (S.D. Cal. May 13, 2013) (same); *Ries v. Ariz.*
26 *Beverages USA LLC*, 287 F.R.D. 523, 533-34 (N.D. Cal. 2012) (same).

27 In this case, Plaintiff fails to allege any facts that plausibly suggest that her
28 alleged injury will occur again. She does not allege that she intends to purchase

1 Defendant's Flex-Able Hose again in the future. To the contrary, Plaintiff emphasizes
2 multiple times in her complaint that had she known the quality of the product—that it
3 is allegedly prone to leaks and ruptures—she would not have purchased the Flex-Able
4 Hose. Given that the allegations suggest little to no possibility that she will purchase
5 the Flex-Able Hose again in future, Plaintiff fails to allege facts that suggest a real and
6 immediate threat of a repeated injury as a result of the alleged misrepresentations about
7 the product. *See Bates*, 511 F.3d at 985. Therefore, Plaintiff lacks Article III standing
8 to pursue her claims for injunctive relief.


9 10 **IV. CONCLUSION & ORDER**

11 In light of the foregoing, the Court **GRANTS** Defendant's motion to dismiss,
12 and **DISMISSES WITHOUT PREJUDICE** Plaintiff's claims for injunctive relief for
13 lack of Article III standing. The Court dismisses the claims for injunctive relief
14 without prejudice because it is possible that another plaintiff could be added to this
15 action who would have standing to pursue injunctive relief. *See Bates*, 511 F.3d at 985
16 ("In a class action, standing is satisfied if at least one name plaintiff meets the
17 requirements."). Thus, if Plaintiff chooses to amend her claims for injunctive relief in
18 a manner that confers standing to the potential class, she must do so no later than
19 **August 15, 2014**.

20 Lastly, the Court **DENIES** Plaintiff's request to remand her claims for injunctive
21 relief to state court because she fails to adequately justify such relief. Because the
22 Court dismisses the claims for injunctive relief without prejudice, she may now, if she
23 chooses to do so, commence a separate action for injunctive relief in state court.

24 **IT IS SO ORDERED.**

25
26 **DATED: July 25, 2014**

27 
28 **Hon. Cynthia Bashant**
United States District Judge